IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 548

BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

BURKE WILLIAMSON,
JACK A. WILLIAMSON,
39 South LaSalle Street,
Chicago 3, Illinois,
Counsel for Petitioner.

W. A. ENDLE,
General Counsel,
Brotherhood of Railroad Trainmen,
Cleveland, Ohio.

ADAMS WILLIAMSON & TURNEY,
Chicago, Illinois,
Of Counsel.

INDEX.

Table of Authorities.

Cases.

Rules.

Statutes.

Text.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. .....

BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Fred A. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner, Brotherhood of Railroad Trainmen, an unincorporated association, intervening defendant and appellant below, herewith petitions for review on writ of certiorari of a decision of the United States Court of Appeals for the Seventh Circuit made November 11, 1948 affirming an order of the United States District Court for the Northern District of Illinois, Eastern Division.

STATEMENT OF THE MATTER INVOLVED.

This is a suit for an injunction and damages based on an alleged violation of an Interstate Commerce Commission order. This petition is concerned with a preliminary injunction against the defendant railroads and their employees, issued when the Brotherhood of Railroad Trainmen, petitioner herein, was not a party. Intervention of the Brotherhood, as of right, was allowed pursuant to mandate of this Court in *Railroad Trainmen* v. *Baltimore & O. R. Co.*, 331 U. S. 519. Immediately after its intervention the Brotherhood moved to dissolve the injunction, and on denial of this motion appealed to the Court of Appeals for the Seventh Circuit, which affirmed. A brief history of the case follows.

Since 1922 The Chicago River and Indiana Railroad Company, herein called the River Road, has operated a switching railroad connecting the Union Stock Yards at Chicago with all of the trunk lines which haul livestock to and from Chicago (R. 3, 13-16). The switching and spotting of stock cars on River Road tracks has been handled in some instances by River Road power and crews and in others by the power and crews of the trunk lines (R. 4, 52-53, 149-157, 190-191, 217). The River Road employees have long contended that under their bargaining agreements they should handle all this work on River Road tracks (R. 110, 112, 120, 144, 188-189).

On January 23, 1946, in order to settle this dispute and other disputes then pending with its yard service employees, the River Road agreed to assign its own employees to do the switching and spotting work on River Road tracks for all *outbound* livestock movements (R. 145, 85). The

agreement provided that foreign line crews would be allowed to handle the *inbound* movements on River Road tracks (R. 85).

The trunk lines were notified of this agreement (R. 6-7), and it thereafter took effect on February 1, 1946 (R. 85), whereupon River Road power and crews began handling the switching and spotting of stock cars on River Road tracks for all outbound movements (R. 149-150). This method effected a change only in the case of outbound shipments of beef cattle, because River Road power and crews had previously handled these movements in the case of other livestock, such as hogs, sheep, horses and show livestock (R. 152-157).

On February 12, 1946 seven of the trunk lines brought this suit (R. 2) for an injunction and damages (R. 11-12), alleging that the above method of handling outbound shipments of livestock, other than hogs and sheep, was violative of Condition 3 in an Interstate Commerce Commission order of May 16, 1922 (R. 5, 8), and praying that an injunction issue against the River Road and its employees to permit plaintiff railroads to handle the disputed movements with their own power and crews on River Road tracks (R. 11-12). The Interstate Commerce Commission, herein called the Commission, intervened as a plaintiff (R. 47) and joined in the prayer for an injunction against alleged violation of Condition 3 of the 1922 Commission Order (R. 49), which is as follows:

> "3. The present traffic and operating relationships existing between the Junction and the River Road and all carriers operating in Chicago shall be continued, in so far as such matters are within the control of the Central" (R. 5).

Neither the River Road employees, who were sought to be enjoined, nor their collective bargaining representatives were named by plaintiffs as parties, *i. e.*, the train-

men (Brotherhood of Railroad Trainmen), the engineers (Brotherhood of Locomotive Engineers), or the firemen and enginemen (Brotherhood of Locomotive Firemen and Enginemen) (R. 2-3, 143-144). The only defendants named were the River Road, The New York Central Railroad Company (herein called the Central) which owns the River Road's capital stock (R. 5), and the Chicago Junction Railway Company (herein called the Junction) which is the lessor of some of the River Road tracks (R. 2-3).

The parties then in the suit entered into a stipulation of facts (R. 51-59) on the basis of which a preliminary injunction as prayed for was granted on March 14, 1946 (R. 59-68). Three days after the injunction against River Road employees went into effect, the trainmen, acting through the Brotherhood, attempted to appear specially to invite the District Court's attention to the absence of River Road employees as indispensable parties (R. 70-71). This was refused (R. 76), and the Brotherhood then sought general intervention of right (R. 94-128), which was also refused (R. 134), but the order denying intervention was reversed on appeal to this Court (R. 287), and the Brotherhood finally was allowed to intervene of right as a defendant on September 26, 1947 (R. 138). The River Road engineers and the firemen and enginemen are still not parties.

Immediately after its intervention the Brotherhood moved to dissolve the preliminary injunction, urging the absence of indispensable parties, non-compliance with the Norris-LaGuardia Act, and that the working agreement, performance of which had been enjoined, was specifically authorized by the Interstate Commerce Act and was not violative of the Commission order sued on (R. 139-142). The Brotherhood filed affidavits in support of this motion (R. 142-157, 188-198), and plaintiff railroads filed counter-affidavits (R. 162-187, 198-222). Pending action on this mo-

tion to vacate the injunction, the Brotherhood also moved for an injunction bond to protect River Road employees (R. 158-160). The District Court denied these motions, except that plaintiff railroads were required to file a bond, limited so as to cover only those losses of trainmen incurred after the Brotherhood's motion for bond had reached the Judge's calendar (R. 260-261, 231). The Brotherhood appealed (R. 261-262), and the Court of Appeals for the Seventh Circuit affirmed (R. 285-294).

The Court of Appeals held that in the earlier appeal this Court had determined the Norris-LaGuardia Act to be inapplicable (R. 290-291); that this statute has no application to suits brought under the Interstate Commerce Act (R. 289-290); that Rule 65(d) of the Rules of Civil Procedure precludes the suggestion that employees of a party can be indispensable parties in an injunction suit (R. 292); and that Rule 52 (a) requires no findings or conclusions as to defenses raised by the Brotherhood (R. 292-293). The Court of Appeals declined to pass on the other defenses, holding that they could be raised only against plaintiffs' application for a permanent injunction (R. 293).

STATEMENT AS TO JURISDICTION.

Judgment Sought to Be Reviewed.

On November 11, 1948, the United States Court of Appeals for the Seventh Circuit entered judgment affirming the order entered February 26, 1948 by the United States District Court for the Northern District of Illinois, Eastern Division, denying the motion of the Brotherhood to vacate the preliminary injunction entered March 14, 1946. Application for writ of certiorari is made February 5, 1949. The opinion of the Court of Appeals, dated November 11, 1948, has been made part of the printed record herein (R. 285-293). The District Court rendered no opinion.

Statutory Provisions and Cases Sustaining Jurisdiction.

The Supreme Court of the United States has jurisdiction, by writ of certiorari granted upon the petition of any party, to review a judgment rendered in a United States Court of Appeals. 28 U. S. C. Sec. 1254. The application may be made within 90 days after entry of such judgment. 28 U. S. C. Sec. 2101.

This Court's jurisdiction to grant certiorari extends to a judgment sustaining a preliminary injunction. *Land* v. *Dollar,* 330 U. S. 731, 735; *United States* v. *General Motors Corp.,* 323 U. S. 373, 377; *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U. S. 399, 418.

Substantial Questions Involved.

The questions involved on this appeal are substantial, as appears from the statement of them immediately following.

QUESTIONS PRESENTED.

The questions presented herein include:

(a) Whether in a case in which intervention is sought for the purpose of urging the applicability of the Norris-LaGuardia Act (29 U. S. C. A. Secs. 101-115) as a defense to injunctive relief, a decision on appeal reversing an order denying intervention necessarily constitutes a determination as to the applicability of the Norris-LaGuardia Act, even though the decision on appeal does not mention the Act.

(b) Whether Section 16(12) of Part I of the Interstate Commerce Act (49 U. S. C. A. Sec. 16(12)), providing that federal courts may issue injunctions to enforce orders of the Interstate Commerce Commission, authorizes the issuance of injunctions in cases involving or growing out of labor disputes notwithstanding the restrictions imposed on the granting of such relief by the Norris-LaGuardia Act (29 U. S. C. A. Secs. 101-115).

(c) Whether in a suit to enjoin the performance of collectively bargained contracts between a railroad carrier and its employees, brought by a third party on the theory that performance of such contracts is violative of an Interstate Commerce Commission order, such employees or their representatives are indispensable parties.

(d) Whether Rule 52(a) of the Rules of Civil Procedure, requiring the court which grants a preliminary injunction to state findings of fact and conclusions of law which constitute the grounds of its action, applies to action taken on a motion to dissolve a preliminary injunction made by a party who intervened of right after issuance of the injunction bringing in new facts and raising questions of law which were not passed on at the original issuance of the injunction, which injunction was based on a stipulation of facts not joined in by the intervenor of right.

(e) Whether Section 5(2)(f) of Part I of the Interstate Commerce Act (49 U. S. C. A. Sec. 5(2)(f)), authorizing collective bargaining agreements for the protection of employees of a railroad carrier whose properties are taken over by another carrier, provides a defense to an action brought to enjoin performance of such agreements on the ground that they are violative of an Interstate Commerce Commission order, and whether this question of statutory interpretation may properly be raised in opposition to a preliminary injunction.

(f) Whether a condition in an Interstate Commerce Commission order requiring a carrier to continue "traffic and operating relationships" with foreign lines can or should be construed to prohibit an agreement between the carrier and its employees providing that such employees may handle car movements on its tracks which were previously handled by foreign crews, and whether this question of the proper interpretation of a Commission order may properly be raised in opposition to a preliminary injunction.

(g) Whether it is in the public interest to enjoin performance of a collectively bargained contract between a carrier and its employees covering car movements on the carrier's own tracks on the ground that an Interstate Commerce Commission order requires that such movements be handled by foreign crews, and whether this question of public interest may properly be raised in opposition to a preliminary injunction.

(h) Whether a preliminary injunction bond may properly be conditioned so as to limit its protection among the persons enjoined to those who have intervened as parties and as to intervenors only for damages sustained after they have been allowed to intervene and their motion for a bond has reached the calendar of the trial judge.

REASONS FOR ALLOWANCE OF WRIT.

There are special and important reasons for review on writ of certiorari herein, as follows:

(a) The Court of Appeals has held that this Court, by its decision in this same case reversing the order of the District Court denying intervention to the Brotherhood, also decided that the Norris-LaGuardia Act is inapplicable and thus is not available as a defense to the injunctive relief sought. The applicability of the Act was not passed on by this Court, nor was the Act mentioned in this Court's opinion (*Railroad Trainmen* v. *Baltimore & O. R. Co.*, 331 U. S. 519). The scope of this Court's decision in the instant case thereby has been seriously misconstrued and misapplied.

(b) The Court of Appeals has held that Section 16(12) of Part I of the Interstate Commerce Act, in authorizing injunctions to enforce orders of the Interstate Commerce Commission, provides an exception to the Norris-LaGuardia Act, so that an injunction may be issued under the former statute irrespective of whether the case involves or grows out of a labor dispute and whether the requirements of the Norris-LaGuardia Act have been met. This holding is in conflict with the decisions of this Court, the Court of Appeals for the Tenth Circuit, and the Court of Appeals for the Fifth Circuit on the same matter, as follows:

> *Lee Way Motor Freight* v. *Keystone Freight Lines*, 126 F. 2d 931 (10th Circuit 1942), certiorari denied in 317 U. S. 645.
>
> *East Texas Motor Freight Lines* v. *International Brotherhood*, 163 F. 2d 10 (5th Circuit 1947).

(c) The Court of Appeals has held that Rule 65(d) of the Rules of Civil Procedure, which provides that an

injunction is binding on the employees of a party to the action, precludes the suggestion that such employees are indispensable parties, although the suit is brought to enjoin performance of collectively bargained contracts wherein the employer and its employees have admittedly adverse interests. This holding seriously misconstrues Rule 65(d) so as to make it provide an exception to the established principles governing indispensable parties, and is in conflict with Rule 65(e) of the Rules of Civil Procedure, which provides that Rule 65(d) does not modify the laws relating to preliminary injunctions in actions affecting employer and employee.

(d) The Court of Appeals has held that Rule 52(a) of the Rules of Civil Procedure requires no findings of fact or conclusions of law constituting the grounds for the District Court's action in denying a motion to dissolve a preliminary injunction, although the motion was made by an intervenor of right who was not a party when the injunction was issued, and whose motion was supported by new facts and who urged defenses not theretofore passed on by the court, and although the preliminary injunction was based on a stipulation of facts not joined in by the intervenor of right. This holding raises an important question of federal law which has not been, but should be, settled by this Court.

(e) The Court of Appeals has held that the applicability of Section 5(2)(f) of Part I of the Interstate Commerce Act, which by its terms purports to authorize the labor contract enjoined herein, is a question which cannot properly be raised as a defense to the preliminary injunction, but should be reserved to a trial on the merits, although the facts relative to this matter are not in dispute and the question is purely one of statutory construction. In this the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

(f) The Court of Appeals has held that in this suit to enjoin alleged violation of an Interstate Commerce Commission order, an interpretation of the order in question as applied to the acts sought to be enjoined is an issue which cannot properly be raised in opposition to the preliminary injunction, but should be reserved to a trial on the merits. In this the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

(g) The Court of Appeals has held that the question whether it is against the public interest to enjoin performance of a collective bargaining agreement between a carrier and its employees may not properly be raised in opposition to a preliminary injunction, but should be reserved to a trial on the merits. In this the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

(h) The Court of Appeals has sanctioned the action of the District Court in refusing to require any preliminary injunction bond to protect the enjoined employees for the period during which they were denied intervention of right even though such denial was held on appeal to be erroneous and motion for such a bond was made promptly after intervention was allowed. These employees thereby have been penalized by the District Court for its own error in denying them intervention, and this constitutes a departure from the accepted and usual course of judicial proceedings which calls for an exercise of this Court's power of supervision.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Court of Appeals for the Seventh Circuit, commanding said Court to certify and send to this Court a full and complete

transcript of the record and of the proceedings of the said Court of Appeals had in the case numbered and entitled on its docket No. 9615, The Baltimore and Ohio Railroad Company, *et al.*, plaintiffs-appellees, *vs.* The Chicago River and Indiana Railroad Company, *et al.*, defendants-appellees, Interstate Commerce Commission, intervening plaintiff-appellee, and Brotherhood of Railroad Trainmen, intervening defendant-appellant, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Court of Appeals be reversed by this Court; and for such further relief as to this Court may seem proper.

February 5, 1949.

BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner.

By .....

.....

BURKE WILLIAMSON,
JACK A. WILLIAMSON,
39 South LaSalle Street,
Chicago 3, Illinois.
Counsel for Petitioner.

W. A. ENDLE,
General Counsel,
Brotherhood of Railroad Trainmen,
Cleveland, Ohio.

ADAMS WILLIAMSON & TURNEY,
Chicago, Illinois.
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. .....

BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of Courts Below.

The District Court did not render an opinion.

The opinion in the Court of Appeals for the Seventh Circuit (R. 285-293) is reported in 170 F. 2d 654 (Baltimore & O. R. Co. *v.* Chicago River & Indiana R. Co.).

Jurisdiction.

1. The date of the judgment sought to be reviewed is November 11, 1948.

2. The statutory provisions which are believed to sustain the jurisdiction of this Court are 28 U. S. C. sections 1254 and 2101.

3. As set forth in the above cited statutory provisions, the Supreme Court of the United States has jurisdiction, by writ of certiorari granted upon the petition of any party, to review a judgment rendered in a United States Court of Appeals. The application for certiorari may be made within ninety days after entry of such judgment. This Court's jurisdiction to grant certiorari extends to a judgment sustaining a preliminary injunction.

4. The cases believed to sustain this jurisdiction are as follows:

Land v. *Dollar*, 330 U. S. 731, 735.

United States v. *General Motors Corp.*, 323 U. S. 373, 377.

Toledo Scale Co. v. *Computing Scale Co.*, 261 U. S. 399, 418.

Statement of the Case.

A statement of the case already has been made in the preceding Petition (pp. 2-5), which hereby is adopted and made a part of this brief.

Specification of Errors.

If the petition is granted, the petitioner will urge that the Court of Appeals for the Seventh Circuit erred in the following respects:

1. In holding that when the petitioner sought to intervene in this case for the purpose of urging the applicability of the Norris-LaGuardia Act (29 U. S. C. A. Secs. 101-115) as a defense to injunctive relief, the decision of the United States Supreme Court on appeal reversing the order of the

District Court denying intervention necessarily constituted a determination as to the applicability of the Norris-LaGuardia Act, even though the decision of the United States Supreme Court did not mention the Act.

2. In holding that Section 16 (12) of Part I of the Interstate Commerce Act (49 U. S. C. A. Sec. 16 (12)), providing that federal courts may issue injunctions to enforce orders of the Interstate Commerce Commission, authorizes the issuance of injunctions in cases involving or growing out of labor disputes notwithstanding the restrictions imposed on the granting of such relief by the Norris-LaGuardia Act (29 U. S. C. A. Secs. 101-115).

3. In holding that in the suit brought by the plaintiff railroads to enjoin the performance of the collectively bargained contracts between the River Road and its employees on the theory that performance of such contracts is violative of the Interstate Commerce Commission order of 1922, such employees or their representatives are not indispensable parties.

4. In holding that Rule 52 (a) of the Rules of Civil Procedure, requiring the court which grants a preliminary injunction to state findings of fact and conclusions of law which constitute the grounds of its action, does not apply to action taken on a motion to dissolve a preliminary injunction made by a party who intervened of right after issuance of the injunction and who brought in new facts and who raised questions of law which were not passed on at the original issuance of the injunction, which injunction was based on a stipulation of facts not joined in by the intervenor of right.

5. In holding that the proper time to consider whether Section 5 (2)(f) of Part I of the Interstate Commerce Act (49 U. S. C. A. Sec. 5 (2)(f)), authorizing collective bargaining agreements for the protection of employees of a railroad carrier whose properties are taken over by an-

other carrier, provides a defense to an action brought to enjoin performance of such agreements on the ground that they are violative of an Interstate Commerce Commission order, is not in opposition to a preliminary injunction but at a trial upon the merits.

6. In holding that the proper time to consider whether a condition in an Interstate Commerce Commission order requiring a carrier to continue "traffic and operating relationships" with foreign lines can or should be construed to prohibit an agreement between the carrier and its employees providing that such employees may handle car movements on its tracks which were previously handled by foreign crews, is not in opposition to a preliminary injunction but at a trial upon the merits.

7. In holding that the proper time to consider whether it is in the public interest to enjoin performance of a collectively bargained contract between a carrier and its employees covering car movements on the carrier's own tracks on the ground that an Interstate Commerce Commission order requires that such movements be handled by foreign crews, is not in opposition to a preliminary injunction but at a trial upon the merits.

8. In refusing to hold that a preliminary injunction bond may not properly be conditioned so as to limit its protection among the persons enjoined to those who have intervened as parties and as to intervenors only for damages sustained after they have been allowed to intervene and their motion for a bond has reached the calendar of the trial judge.

SUMMARY OF ARGUMENT.

I.

This Court's Decision Has Been Misconstrued.

The earlier appeal to this Court involved only the question whether the Brotherhood had an absolute right to intervene, and this Court did not decide whether the Norris-LaGuardia Act is applicable. The Court of Appeals has misconstrued this Court's decision as determinative of the latter question, even though the Norris-LaGuardia Act was not mentioned in this Court's opinion. Certiorari should be granted to correct this misconstruction.

II.

The Interstate Commerce Act Has Been Erroneously Interpreted as Providing an Exception to the Norris-LaGuardia Act.

The Court of Appeals has held in this case that the Norris-LaGuardia Act is inapplicable to an injunction suit brought under the Interstate Commerce Act, whereas the Fifth and Tenth Circuits have held that the Norris-LaGuardia Act must be complied with in injunction suits involving or growing out of labor disputes regardless of the remedies provided under the Interstate Commerce Act. Certiorari should be granted to resolve this conflict.

III.

Rule 65(d) of the Rules of Civil Procedure Has Been Incorrectly Interpreted to Mean That Employees of a Party, Irrespective of Their Interest, Cannot Be Indispensable Parties.

Even though acts done by River Road employees pursuant to their contract with the River Road prompted this suit, which was brought to enjoin performance of that contract, the Court of Appeals has held that River Road employees cannot be indispensable parties because Rule 65(d) provides that an injunction binds employees of a party, and the River Road has been made a party. Rule 65(d) is founded on the theory of representation, and was not intended to permit the issuance of injunctions against employees in their absence when their interests are directly affected by the suit and are in conflict with the interests of their employer.

IV.

Rule 52(a) of the Rules of Civil Procedure Has Been Incorrectly Interpreted as Not Applying to a Motion to Dissolve an Injunction, Even Though Findings and Conclusions on the Motion Are Necessary to Disposition of the Appeal.

When the Brotherhood was permitted to intervene of right as a defendant it moved to dissolve the preliminary injunction theretofore entered and brought in new facts and raised new legal points not before the District Court when the preliminary injunction was issued on the basis of a stipulation of facts to which the Brotherhood was not a party. On denying the Brotherhood's motion the District Court refused to make findings of fact and conclusions of law to dispose of the new issues, and the Court of Appeals

approved on the theory that Rule 52(a) does not apply to a motion to dissolve an injunction. This interpretation of the Rule destroys its purpose.

V.

A Preliminary Injunction Should Not Be Permitted to Stand Without Consideration of Legal Points Fundamental to the Propriety of Its Issuance.

When the Brotherhood was permitted to intervene of right it moved for reconsideration of the preliminary injunction, calling attention to a statute which on its face authorized the collective bargaining agreement performance of which the injunction forbade, to the public interest harmed by the injunction, and to the highly doubtful interpretation of the Commission's order on which the injunction was based. The District Court let the injunction stand without passing on these points, and the Court of Appeals said the points could be considered at the trial on the merits. This action violates principles of law governing issuance of preliminary injunctions and duty of a reviewing court to pass on issues fundamental to the further conduct of the case.

VI.

The Conditions of the Injunction Bond Covering Employees Should Be as Broad as the Injunction.

The Court of Appeals has sanctioned the District Court's refusal to require an injunction bond covering River Road trainmen for the period during which they were erroneously denied intervention. River Road employees are entitled to a bond for the entire period the injunction against them has been in effect. The trainmen should not be made to suffer for the court's error in denying their application for intervention.

ARGUMENT.

I.

The Court of Appeals Has Misconstrued This Court's Decision in the Instant Case as Holding That the Norris-LaGuardia Act Is Inapplicable.

The earlier appeal to this Court in the instant case involved one question: whether the Brotherhood had an absolute right to intervene in this proceeding. The answer to that question determined this Court's jurisdiction on appeal and the merits of the appeal as well. As this Court stated in the concluding paragraph of its opinion (*Railroad Trainmen* v. *Baltimore & O. R. Co.*, 331 U. S. 519, at 531-532):

> "We thus conclude that Section 17 (11) [of the Interstate Commerce Act] gives the Brotherhood an absolute right to intervene in this proceeding, making it unnecessary to discuss whether, and to what extent, the Brotherhood would have had such a right apart from Section 17 (11). It follows that we have jurisdiction to consider the appeal on its merits. And in the exercise of that jurisdiction, we reverse the judgment of the District Court denying leave to the Brotherhood to intervene."

Now the question is whether the above decision by this Court sustaining the Brotherhood's absolute right to intervene also constitutes an adverse determination of one of the principal defenses for which the Brotherhood sought intervention—the applicability of the Norris-LaGuardia Act. The Court of Appeals has held that it does, reasoning as follows (R. 290-291):

> "• • • in its brief in the Supreme Court in the *Brotherhood* case, *supra*, appellant argued that the Norris-LaGuardia Act was applicable; hence we believe

that the question of whether or not the Norris-La Guardia Act was applicable is settled, since the Supreme Court was aware of the fact that Brotherhood, if intervention was allowed, would attack the jurisdiction of the District Court and would insist that the case was one to which the requirements of the Norris-LaGuardia Act were applicable. In these circumstances the Supreme Court would, so we think, proceed to examine and determine not only its own jurisdiction but also the jurisdiction of the District Court, *M. C. & L. M. Ry.* v. *Swan*, 111 U. S. 379, 382; *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449; *Kentucky* v. *Powers*, 201 U. S. 1, 35; and *Chicago, B. & Q. Ry.* v. *Willard*, 220 U. S. 413, 419. If the District Court was without jurisdiction, the Supreme Court would have said so. We conclude that the Norris-LaGuardia Act was not applicable."

The above cited authorities relied on by the Court of Appeals hold that where federal jurisdiction depends on diversity of citizenship or the existence of a federal question and such elements do not affirmatively appear, the court is bound to note lack of jurisdiction on its own motion. They do not hold that a decision which fails to note lack of jurisdiction constitutes an adjudication that jurisdiction exists. The Court of Appeals has applied such a rule to the Norris-LaGuardia Act, apparently on the theory that the Act is as much a part of the basic law of federal jurisdiction as the rule on diversity of citizenship, and that this Court, even though it did not mention the Norris-LaGuardia Act, is bound to have decided that it is not applicable.

If this were the law, then a plaintiff, in order to get his case into a federal court, should affirmatively allege the inapplicability of the Norris-LaGuardia Act. This Court has said that such an allegation in a complaint merely anticipates a defense, and that when a case involving the applicability of the Act is improperly appealed to this

Court, it must be remanded for determination of the Norris-LaGuardia Act question by the Court of Appeals.

International L. G. W. Union v. *Donnelly G. Co.*, 304 U. S. 243.

On the motion to intervene the Act was mentioned only as an example of the inadequacy of the River Road's representation of its employees' interest (R. 98-99). It should be remembered also that the plaintiffs' complaint sought not only injunctive relief but also money damages (R. 11-12). We think it is plain that this Court was not bound, merely because the Norris-LaGuardia Act restricts a federal court's power to grant injunctive relief in certain cases, to decide the applicability of the Act in connection with an appeal from an order denying intervention.

Of much greater import is the question whether this Court actually intended to pass on the Norris-LaGuardia Act's applicability to this case. Since the Act is not mentioned in this Court's opinion, such silence on the subject should at least counsel caution against the conclusion that this Court intended to make any decision regarding the Act. If such an intention has been correctly inferred from this Court's silence, then this Court has done a most ironical thing: it has said that the Brotherhood may intervene, but by failing to say more it has thereby adjudicated against the Brotherhood the merits of one of the principal defenses for which intervention was sought. Because we are confident that this Court had no such intention, we submit that a writ of certiorari should be granted in order to correct a serious misconstruction of this Court's decision.

II.

The Court of Appeals Has Erroneously Interpreted the Interstate Commerce Act as Providing an Exception to the Norris-LaGuardia Act.

We have seen that the Court of Appeals held that the question of the applicability of the Norris-LaGuardia Act to this case was settled by this Court in the earlier appeal. The Court of Appeals also held the Act inapplicable because this suit was brought under the Interstate Commerce Act, which the Court of Appeals considered a special statute providing an exception to the Norris-LaGuardia Act, which it deemed a general statute. As stated by the Court of Appeals (R. 290):

> "* * * where there are two statutes, the earlier special and the later general, the special controls the general, and the fact that one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general. * * * Here there was no express repeal by Congress of Sec. 16(12) of the Interstate Commerce Act; on the contrary it was amended and re-enacted after the passage of the Norris-LaGuardia Act."

Thus the Court of Appeals has assumed that the Interstate Commerce Act and the Norris-LaGuardia Act both deal with the same subject, and are in hopeless conflict. Even if we grant that these statutes are *pari materia* in that the Interstate Commerce Act provides for injunctions and the Norris-LaGuardia Act provides against them, it does not follow that one must always prevail and the other yield. When they are read together they simply mean that if an injunction is sought under the Interstate Commerce Act and the case involves or grows out of a labor dispute, plaintiff must satisfy both statutes. That was the holding of the Court of Appeals for the Tenth Circuit in

Lee Way Motor Freight v. *Keystone Freight Lines*, 126 F. 2d 931 (1942) (certiorari denied in 317 U. S. 645) at 126 F. 2d 934:

> "• • • whatever other remedies may or may not be available, there is nothing in the exactions of the Motor Carrier Act [Part II, Interstate Commerce Act] which operates to enlarge beyond the limitations of the Norris-LaGuardia Act the jurisdiction of a United States Court in respect to the issuance of a restraining order or a temporary or permanent injunction in a controversy involving or growing out of a labor dispute."

In 1947 the Fifth Circuit followed the *Lee Way* decision in a case involving the same question. *East Texas Motor Fr. L.* v. *International Brotherhd*, etc., 163 F. 2d 10. In that case, the court said (at p. 12):

> "• • • we are in no doubt that the case • • • is one arising out of a labor dispute. Neither are we in any doubt that since it is one so arising, plaintiff, not having complied, or attempted to comply, with the Norris-LaGuardia Act is in effect seeking to enlarge the jurisdiction of the federal courts as limited by that act by its claim that the court should issue the injunction because the acts complained of are violations of duties or obligations arising under the Interstate Commerce Act, 49 U. S. C. A., Sec. 1 *et seq. Lee Way Motor Freight, Inc.* v. *Keystone Freight Lines*, 10 Cir., 126 F. 2d 931, a case directly in point, so decides, and we are in no doubt that it was well decided."

The holding of the Seventh Circuit in the instant case is obviously in conflict with both these decisions of other circuits.

If the Interstate Commerce Act, in providing for injunction suits, exempts the litigant who invokes its provisions from complying with the Norris-LaGuardia Act even though the case involves or grows out of a labor dispute, there is no reason for requiring compliance of a

plaintiff who brings his suit under any other federal statute containing provisions for injunctive relief.

In a broader sense, this decision is a step backward toward the view rejected by this court in *United States* v. *Hutcheson*, 312 U. S. 219, that trade union conduct which the Norris-LaGuardia and Clayton Acts purport to protect may nevertheless be condemned and punished under the guise of enforcing some other federal statute. We submit that the present decision ought to be reviewed.

III.

The Court of Appeals Has Erroneously Construed Rule 65(d) of the Rules of Civil Procedure to Mean That Employees of a Party Cannot Be Indispensable Parties.

The preliminary injunction prohibited performance of the labor contracts covering the disputed work which were in effect between the River Road and its engineers, its firemen and enginemen, and its trainmen when this suit was filed. Referring to the trainmen's contract in connection with the earlier appeal, this Court said (331 U. S. 530):

> "Acts done by the employees in performance of this contract obviously prompted this suit; and any such acts performed after the issuance of an injunction might give rise to contempt action."

No River Road employees or their representatives were parties when the preliminary injunction was issued. The engineers, and the firemen and enginemen, are still not parties. The Court of Appeals has rejected the Brotherhood's contention that such employees are indispensable parties as follows (R. 292):

> "The injunction was issued conformably to Rule 65(d) of the Rules of Civil Procedure, and when we apply the rule that an injunction may issue against and be binding upon the employees of a party with-

out the employees being made parties to the suit, it is clear that the principle of indispensable party cannot be invoked in this case."

Rule 65(d) provides that an injunction is "binding only upon the parties to the action, their officers, agents, servants, employees and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise". The effect of the above holding is that irrespective of the nature of their interest in an injunction suit, employees of a party must be considered, by reason of Rule 65(d), as something less than indispensable parties.

In considering this question, we may note first that if Rule 65(d) was intended to deal with the subject of whether employees shall be made parties in injunction suits, then there is no vitality in Rule 65(e), which provides that none of the Rules modifies the statutes relating to injunction suits "affecting employer and employee". If Rule 65(d) does provide this exception to the general rule as to indispensability, then any labor contract which an employer finds onerous may be nullified by an injunction suit brought by third parties against the employer alone without the burden of meeting any defense which could be offered by the defendant's employees, who would be the real parties in interest.

The rule that an injunction binds the officers, agents, servants and employees of a party is obviously founded on the theory of representation. In this case the River Road does not represent the employment interests of its engineers, firemen and enginemen, or trainmen. These employees are represented in their employment rights by their respective brotherhoods. The River Road has even stated that it has interests in this suit which are in conflict with those of its employees (R. 129).

It is unthinkable that this Court, in adopting Rule 65(d),

intended that it be construed so as to impinge in this manner upon the guarantees provided in present labor statutes for separate employee representation. We therefore submit that Rule 65(d) was not designed to authorize, in injunction cases, the omission of parties who would in other cases be indispensable. The decision of the Court of Appeals, in that it construes this rule as conferring jurisdiction on a federal court to enjoin persons who are not before it, irrespective of their interest in the subject matter of the suit, merely because their employer has been made a party, fully warrants review by this Court.

IV.

Reconsideration of a Preliminary Injunction on Motion to Dissolve Made by a Subsequent Intervenor of Right Who Brings in New Issues Requires the Court to Make New Findings of Fact and Conclusions of Law Under Rule 52(a).

The Court of Appeals has limited the application of Rule 52(a) of the Rules of Civil Procedure so as to destroy its purpose. That Rule is in part as follows:

> "* * * and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. * * *"

Of this Rule the Court of Appeals said:

> "In our opinion Rule 52(a) applies in a case where the court grants or refuses an injunction. It does not apply on a motion to dissolve an injunction." (R. 293.)

The facts of this case on the basis of which the Court of Appeals announced its limitation to the Rule are as follows:

On February 25, 1946, which was more than a year prior to the time the Brotherhood was permitted to intervene of right on September 26, 1947 (R. 138), the then parties entered into a stipulation of facts (R. 51-59). On the basis of this stipulation the court entered a preliminary injunction on March 14, 1946 (R. 59).

One of the findings of fact, paragraph 13, contained in the preliminary injunction order (R. 64) found the principal issue in favor of the plaintiffs and against the then defendants, namely, that the change in operating arrangements was a violation of the Interstate Commerce Commission order. Two of the conclusions of law, paragraph 4 (R. 65) and paragraph 8 (R. 66), decided the same issue in favor of the plaintiffs and against the then defendants.

No findings of fact or conclusions of law as to irreparable injury to the plaintiffs were contained in the preliminary injunction order. The answer thereafter filed denied any such injury (R. 9-10, 80-81).

Immediately after the Brotherhood was permitted to intervene of right as a defendant, it moved to vacate the preliminary injunction (R. 139-142), which motion was supported and opposed by affidavits (R. 142-157, 162-186, 188-222).

Included in the new questions of fact and law thus raised were the following:

(1) Whether employees of the River Road, as trainmen, engineers, and firemen and enginmen were indispensable parties to this proceeding on March 14, 1946 and whether such engineers and firemen and enginemen are now indispensable parties to this proceeding.

(2) Whether this case involves or grows out of a labor dispute.

(3) Whether the collective bargaining agreement between the River Road and its employees is authorized by Section 5(2)(f) of Part I of the Interstate Commerce Act (49 U. S. C. A. Sec. 5(2)(f)).

(4) Whether it is in the public interest to grant the prayer of the plaintiffs' complaint for an injunction against the performance of the collective bargaining agreement between the River Road and its employees.

The Brotherhood's motion and the affidavits mentioned also put in issue whether the collective bargaining agreement between the River Road and its employees violated the Interstate Commerce Commission order of May 16, 1922 (R. 141) and whether the change in operating methods caused any delay in the movement of plaintiffs' cars (R. 147).

When the District Court denied the Brotherhood's motion to dissolve the preliminary injunction it refused to make findings of fact and conclusions of law (R. 251). The court explained its action when it declared that an intervenor takes the case as it is when he intervenes and is bound by all orders entered up to that time, and that since a complete set of findings of fact was entered previously, there was no need to re-state them (R. 258).

As a result of this action of the District Court, the Brotherhood and, it is believed, the Court of Appeals could only guess whether the District Court was deciding each of the issues raised by the Brotherhood adversely to the Brotherhood or making no disposition whatever of these issues on the theory that the intervenor of right was compelled to take the case as he found it. The injustice of this result, both to the Brotherhood and to the reviewing court, is patent.

When the Brotherhood as an intervenor of right who had not signed the stipulation of facts moved to dissolve the preliminary injunction and for summary judgment and brought in new facts and raised new issues, the District Court was confronted with a situation which in legal contemplation was exactly the same as if it were consider-

ing originally the question of whether a preliminary injunction should be granted.

It is respectfully suggested that the narrow construction placed by the Court of Appeals on Rule 52(a) signifies a failure to understand the purpose of the Rule. That purpose was stated by this Court in *Mayo* v. *Lakeland Highlands Can. Co.*, 309 U. S. 310 at page 316:

> "It is of the highest importance to a proper review of the action of a court in granting or refusing a preliminary injunction that there should be fair compliance with Rule 52(a) of the Rules of Civil Procedure."

The court continued at page 317:

> "Moreover, if appellants conceived themselves aggrieved by the action of the court upon motion for preliminary injunction, they were entitled to have explicit findings of fact upon which the conclusion of the court was based. Such findings are obviously necessary to the intelligent and orderly presentation and proper disposition of an appeal."

The Brotherhood believes that the Court of Appeals in its limitation of Rule 52(a) has decided an important question of federal law which has not been, but should be, settled by this Court, and has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

V.

Questions Fundamental to the Issuance of a Preliminary Injunction Must Be Passed on by the Reviewing Court When Presented to It.

When the Brotherhood attacked the preliminary injunction in the District Court by motion and affidavits it

invited the Court's attention to a statute which on its face authorized the collective bargaining agreement performance of which the injunction forbade (Section 5(2)(f) of Part I of the Interstate Commerce Act (49 U. S. C. A. Sec. 5(2)(f)) (R. 142). The Brotherhood also alleged that it was not in the public interest to enjoin performance of the collective bargaining agreement (R. 142) and cited a case almost identical on its facts in which a federal district court had denied an injunction as not in the public interest (*Gulf, M. & N. R. Co.* v. *Illinois Cent. R. Co.*, 21 F. Supp. 282) (R. 99). The Brotherhood also alleged that the change in operating methods made pursuant to the collective bargaining agreement did not violate the Interstate Commerce Commission order (R. 141).

As already pointed out, when the Brotherhood as an intervenor of right moved to dissolve the preliminary injunction and for summary judgment and brought in new facts and raised new issues, the District Court was confronted with a situation which in legal contemplation was exactly the same as if it were considering originally the question of whether a preliminary injunction should be granted. The District Court therefore was considering the propriety of issuance of a preliminary injunction, not to maintain the status quo but to alter an existing situation, in the face of a statute which appeared to destroy the basis for the plaintiffs' suit, in the face of a case which held a request for a similar injunction to be not in the public interest, and in the face of facts brought in by affidavit which rendered highly doubtful the plaintiffs' interpretation of the Commission's order. The District Court let the preliminary injunction stand without consideration of these points on the theory that the Brotherhood as an intervenor was bound by all orders theretofore entered (R. 258).

The Brotherhood's efforts to have the Court of Appeals pass on these points were equally fruitless. As the Court said:

> "We do not discuss these contentions because the proper time to consider them is upon a trial upon the merits, where appellant may avail itself of any defense it may have" (R. 293).

A preliminary injunction should not be granted if the pleadings and affidavits disclose that the plaintiffs' contentions in fact and in law are seriously disputed. *United States* v. *Weirton Steel Co.*, 7 F. Supp. 255, 265; *Hand* v. *Missouri-Kansas Pipe Line Co.*, 54 F. Supp. 649, 651. Further, the right asserted by the plaintiffs must be perfectly clear and free from doubt where the effect of a preliminary injunction will be more than merely the maintenance of the status quo. 43 C. J. S. Section 19, page 432. To authorize a preliminary injunction, the plaintiffs must make out at least a prima facie showing of a right to the final relief. 43 C. J. S. Section 19, page 433.

The procedure which the Court of Appeals should have followed is that of this court in *United States* v. *General Motors Corp.*, 323 U. S. 373. In that case the Court of Appeals had reversed the judgment of the district court, had given instructions as to items of damage, and had remanded the cause for trial in accordance with its ruling. After this Court had granted certiorari it said, at page 377, of the above ruling of the Court of Appeals:

> "We think we should review that ruling inasmuch as it is fundamental to the further conduct of the case. The correctness of the decision of the court below depends upon the scope and meaning of the constitutional provision: 'nor shall private property be taken for public use, without just compensation,' which conditions the otherwise unrestrained power of the sovereign to expropriate, without compensation, whatever it needs."

Certainly the legal points raised by the Brotherhood as an intervenor of right were fundamental to the further conduct of this case. The action of the Court of Appeals would subject the Brotherhood to the expense of a trial on the merits even though the statute, the public interest, and the question of interpretation of the Commission's order would require the denial of the injunction sought by the plaintiffs as soon as some court took the trouble to consider them on the record already made.

The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

VI.

The Court of Appeals Should Not Have Sanctioned the District Court's Refusal to Require an Adequate Bond to Protect Enjoined Employees.

The opinion of the Court of Appeals declined to discuss the questions raised by the Brotherhood concerning the several inadequacies of the injunction bond (R. 265) other than to say that no bond conditioned under the Norris-LaGuardia Act was required (R. 293). Thus the Court of Appeals has tacitly sanctioned the District Court's refusal to require a bond protecting the enjoined employees in any manner for the period between March 14, 1946, when the injunction against them was issued, and October 13, 1947, the date after River Road trainmen were allowed to intervene when their motion for bond reached the trial judge's calendar (R. 231). The bond for employees as required by the District Court was limited so as to cover trainmen only, and as to them only for damages sustained after October 13, 1947 (R. 261).

There is no doubt that the District Court could have

required plaintiffs, after the Brotherhood finally was allowed to intervene, to furnish a bond which would cover River Road employees as to losses sustained at all times since the original issuance of the injunction. *Donnelly Garment Co.* v. *International Ladies' G. W. Union*, 55 F. Supp. 572, 584 (affirmed in 147 F. 2d 246, certiorari denied 325 U. S. 852). The question here is whether the Court could withhold such protection from River Road employees without serious departure from the accepted and usual course of judicial proceedings.

In considering this question, it is immaterial whether the requirement of bond is governed by Rule 65(c) of the Rules of Civil Procedure or Section 7(e) of the Norris-LaGuardia Act (29 U. S. C. A. Sec. 107(e)). Neither authorizes the issuance of an injunction with security less broad in its coverage than the injunction. The discretionary power in a district court to fix the amount of the security does not include the power to waive it entirely as to certain persons enjoined, or to exclude from its protection certain periods of time covered by the injunction.

The District Court denied the trainmen a bond to cover the period between March 14, 1946 and October 13, 1947 evidently on the theory that the Brotherhood, as an intervenor, "enters the case as it finds it" (R. 230), wherefore the coverage of the bond for trainmen should begin only after intervention. The plaintiffs were thus given an injunction without bond, at the trainmen's expense, during the time it took to correct the court's error in denying intervention. With no intention of appearing cynical, we suggest that the District Court seems to have been more willing to forgive plaintiffs for having been wrong on the question of intervention than to forgive the trainmen for having been right about it. The seriousness of this error on the part of the District Court becomes readily apparent

when it is remembered that recoverable losses of persons wrongfully enjoined are limited by the terms and to the amount of the injunction bond, as was held in the *Donnelly* case, *supra*, (147 F. 2d, at page 253). It follows that a failure by the court to require plaintiffs to furnish a proper bond can result in irreparable injury.

Conclusion.

For the reasons herein stated, we respectfully urge that this Court, in the exercise of its sound judicial discretion, grant the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

BURKE WILLIAMSON,
JACK A. WILLIAMSON,
39 South LaSalle Street,
Chicago 3, Illinois,
Counsel for Petitioner.

W. A. ENDLE,
General Counsel,
Brotherhood of Railroad Trainmen,
Cleveland, Ohio.

ADAMS WILLIAMSON & TURNEY,
Chicago, Illinois,
Of Counsel.